

IN THE  
**Supreme Court of the United States.**

**OCTOBER TERM, 1896.**

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*No. 563.*

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THE INTERSTATE COMMERCE COMMISSION,  
APPELLANT,

vs.

THE ALABAMA MIDLAND RAILWAY COMPANY  
ET AL.

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**REPLY TO MR. BAXTER'S SUPPLEMENT.**

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As Mr. Baxter's supplemental brief was not filed until just before noon of March 16, 1897, the last day of the oral argument, it was not possible carefully to examine it. I desire to submit a few observations upon it.

*Judicial notice.*—Mr. Baxter quotes from the brief for appellant in No. 539, p. 73, a portion of one sentence. The

whole paragraph from which the quotation is made is as follows (referring to the statistics as to free cartage):

These statistics were collected in pursuance of the legal duties of the Commission, which was entitled to use them, because they had become part of its quasi-judicial knowledge as a board of experts. This Court would seem entitled to examine the statistics, because, by incorporation in an official report, they have become matter of public knowledge, as well as because, in reviewing a decision of a board of experts, it is entitled to consider everything which the board could and did consider.

Two reasons are here suggested for judicially noticing the information conveyed in the Commission's report concerning the practice of free cartage: First, that through the report the statistics had become matter of public knowledge; and second, that the Court in reviewing the decision of the Commission is entitled to consider everything which the Commission could and did consider.

The first of these reasons is partly applicable to the present case; the second not at all.

The Commission in its annual report makes no mention of any single railway company's earnings. The publication upon which Mr. Baxter relies is the report by the statistician of the Interstate Commerce Commission, made to the Commission. It consists of a tabulation of the returns made by various railway companies. The Commission probably made

no use of this tabulation in the present case, since it did not occur to the Alabama Midland Railway Company to plead poverty until after the case got into court. If such a plea had been made before the Commission, it would doubtless have used the reports of the railway, as tabulated by its statistician, as a basis of inquiry; but it would have prosecuted the inquiry further by examining into the correctness of the figures concerning distribution of earnings and expenses as between the main line and branch line of the company; its relations to the Plant system; and whether it received a fair apportionment of the through rates over that combination of railways and water lines, etc. In prosecuting this inquiry it would doubtless have utilized such information as is afforded by Poor's Manual and other standard publications upon railway matters, testing their accuracy by original investigations.

The limits of judicial notice in this direction are not well defined (154 U. S., at pp. 408-9). It may be an open question, even, whether the cartage statistics actually considered by the Commission in the other case are thus noticeable; a question wider open whether statistics collected and published by the Commission but not called to its attention in the present investigation, and first appealed to upon argument in this Court, are noticeable; and likewise whether upon such an appeal the Court may use what is common knowledge among railroad men, ascertainable through newspaper advertisements, "folders," the "Investors' Supplement," Poor's Manual, the Travellers' Official Guide, etc.

If the figures reported to the Commission are judicially noticed *as true*, what happens when, as here, they are contradicted by sworn evidence in the record? Can that be contradicted which is judicially known to be true? (See 109 U. S., at p. 253.)

It may perhaps be the better rule that the Court should avoid noticing this class of statistics on behalf of either party unless they were called to the attention of the Interstate Commerce Commission when the controversy was pending before that tribunal.

Being unaware of any authoritative decision as to the limit of judicial notice in these particulars, I ask leave to supplement Mr. Baxter's supplement by stating certain facts of general knowledge among railroad men, leaving the Court to notice them or not, as it may deem proper.

*Statistics set forth by Mr. Baxter.*—Mr. Baxter's figures are correctly transcribed from the report of the Commission's statistician, and represent statements made by the Alabama Midland railway officials in their statutory reports. The words "Went into Plant system this year" (referring to the fiscal year 1894) are not quoted from anything in the Commission's publication. They are based on the fact that the Plant system is referred to in the statistics for 1894 and 1895, and not in those of the previous years. They contradict the company's own witness, who shows that it has been in the "system" at least since November 1, 1892 (p. 351).

Prior to 1894 the "system" was not named in the reports of the statistician; but it existed nevertheless, and the Alabama Midland was a part of it, H. B. Plant being its president and M. F. Plant its vice-president.

The distinction is immaterial, as the Commission's order was made in the fiscal year 1894.

It will be noticed that the deficit for 1893 differs from that stated by the witness McLendon by about \$25,000. The reports to the Commission show a surplus of \$87,158 for 1896. These are not yet published in the form of an official report.

*Incompleteness of official information.*—If the Interstate Commerce Commission were dealing with this question, they would not be content with their own statistics, and for an obvious reason. The Plant system is a whole, and each part is worked for the benefit of the whole. The main line is the Savannah, Florida and Western road, to which the Alabama Midland is but a feeder. Whether or not the "Plant system," or Plant Investment Company, as a whole is a profitable business concern cannot be learned from the Commission's statistics, for the reason that it partly consists of railroads entirely situated in one State, while it also contains other lines of business. For instance, it runs a line of steamers from Mobile to Tampa and Key West and thence to Havana, Cuba; another line of steamers from Columbus, Georgia, to Apalachicola and return via the Chatta-

hoochee river (advertising to make the down trip in two days and the return trip in three days, connecting with various railroads, "river, fog, etc., permitting"); a line of steamers from Port Tampa to Port Antonio, Jamaica; a land department for the sale of town sites, township plats, etc., in Florida; and seven large hotels in that State. Poor's Manual for 1894 gives a statement of the net revenue and payments therefrom of all *railroads* comprising the Plant system, for the fiscal year ending June 30, 1893, which shows that, after paying all deficits on other lines, including interest on bonds, the Savannah, Florida and Western had nearly \$100,000 available for dividends.

The Alabama Midland being a mere feeder, it is immaterial to its managers whether or not it is given a fair division of through rates. Its bonds are guaranteed by the Savannah, Florida and Western. Its stock is controlled by the Plant Investment Company, which naturally does not care whether out of every dollar charged for freight from Montgomery to Savannah 25 cents is given to the Alabama Midland and 75 cents to the Savannah, Florida and Western, or *vice versa*. Moreover, assuming that under a fair division of through rates the Alabama Midland would still be unable to pay interest on its bonds, is that sufficient to deprive the localities along its line of the benefits of the interstate commerce act? It is very common that lines which are mere feeders for trunk lines show a heavy deficit, while they are profitable to the trunk line, which can well afford to pay the deficit in return for being fed.

The Alabama Midland itself has a branch line, and its return does not show whether the deficit is caused by the main line or the branch line. It may well be that, with a fair division of through rates from the S., F. & W., the main line would be able to pay the interest on its bonds (which seem to cover all cost of construction, being about \$15,000 per mile), and something on the stock besides, if it were not for the drain caused by the branch line. This would be another point which the Commission would look into.

*Relevancy of investigation.*—The whole investigation seems to be irrelevant in view of the fact that no figures are given us which bear upon the actual loss of gross earnings which would be caused by enforcing the first four orders of the Commission, while we are shown that the loss by enforcing the fifth and sixth orders of the Commission would be under, and probably very far under, \$7,500—a trivial sum in view of the \$490,000 gross earnings of the road in 1893; the \$548,000 gross earnings in 1894; the \$531,000 gross earnings in 1895, and the \$608,000 gross earnings in 1896. Even this slight loss might be diminished by a policy more favorable to building up the local traffic of the railroad.

Respectfully submitted.

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